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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

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PCS 2000, L.P.

) File Nos. 00414-CW-L-96,
) et al.

) For Broadband Block C Personal
) Communications Systems Facilities
)

) and
)

) Westel Samoa, Inc.
)

) WT Docket No. 97-199
)

) For Broadband Block C Personal
) Communications Systems Facilities
)

) File No. 00560-CW-L-96
)

) and
)

) Westel, L.P.
)

) File Nos. 00129-CW-L-97,
) et al.
)

) For Broadband Block F Personal
) Communications Systems Facilities
)

) and
)

) In the Matter of
)

) Anthony T. Easton
)

To: The Commission

REPLY TO OPPOSITIONS TO
MOTION TO CONSOLIDATE

Anthony T. Easton, by his attorneys and pursuant to section 1.45(b) of the Commission's Rules ("Rules"), hereby replies to the pleadings filed by ClearComm, L.P. ("ClearComm") and the Wireless Telecommunications Bureau ("Bureau") in opposition to Mr. Easton's Motion to Consolidate ("Motion").

I

As a threshold matter, Mr. Easton points out that he did not file what ClearComm labels as the "Easton NAL Petition". Opposition to Motion to Consolidate at 2 (Feb. 23, 1998) ("ClearComm Opp.").

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That petition was filed by M. Eloise Rosenblatt, as trustee of the SDE Trust ("Trust"). See Petition for Reconsideration at 1 (Feb. 21, 1997) ("Trust Pet.").

ClearComm's repeated references to the Trust as among the "Easton interests" underscores the fundamental unjustness of the Commission's treatment of the Trust and its beneficiary, Susan D. Easton. See ClearComm Opp. at 4 & n.7, 7. As ClearComm correctly notes, the Commission considered the Trust to be one of the "Easton interests" that had to be ousted as a condition precedent to the grant of ClearComm's applications. See *id.* at 4 n.7. However, neither the Commission, the Bureau, nor ClearComm has been able to state specifically the factual or legal rationale for attributing ownership of the stock held by the Trust to Mr. Easton. Nor have they been able to provide a factual or legal justification for the "imputation of misconduct to Easton's wife" as ClearComm puts it. See *id.* at 7.

Regardless of its view of Mr. Easton, the Commission had no cause to treat the Trust as among the "Easton interests" or the so-called "wrongdoers". *PCS 2000 NAL, L.P.*, 12 FCC Rcd 1703, 1717 (1997) ("*PCS 2000 NAL*"). That treatment was unprecedented and wholly inconsistent with what appears to be current policy. See *MobileMedia Corp.*, 12 FCC Rcd 14896, *stayed*, 12 FCC Rcd 7927 (1997).

II

Mr. Easton notes that the Commission has already consolidated two proceedings involving parties to the infamous bidding error of PCS 2000, L.P. ("*PCS 2000*"). See *Westel Samoa, Inc.*, 12 FCC Rcd

14057, 14058 (1997). In the process, the Commission recognized the benefits of consolidation when issues "arise from common facts and circumstances". *Id.*

Mr. Easton expressly requested the Commission to "consolidate . . . three matters for disposition". Motion at 1. He obviously asked only for "[c]onsolidated consideration of inter-related requests". *Id.* at 3. Neither ClearComm nor the Bureau voiced an "objection" to that simple request. See ClearComm Opp. at 2-3; Wireless Telecommunications Bureau's Opposition to Motion to Consolidate at 4-5 (Feb. 23, 1998) ("Bureau Opp."). Therefore, the relief Mr. Easton actually requested may be granted as unopposed.

III

ClearComm and the Bureau are of the view that Mr. Easton's request for relief is unclear. ClearComm Opp. at 1; Bureau Opp. at 4. Mr. Easton does not agree. However, any lack of clarity is understandable since nothing about this entire controversy is clear. Indeed, ClearComm seeks to intervene in the *Westel* hearing because it is "unclear" whether the facts as determined by the Commission in its *PCS 2000 NAL* will "govern" the hearing or will be "relitigated". ClearComm Opp. at 5 & n.7. Mr. Easton shares that uncertainty and more. Consequently, all he could do with certainty is to ask the Commission to consider all matters arising from the mistaken \$180 million bid as a package (in the interests of economy, justice and consistent decision-making). See Motion at 5.

What is clear is that Mr. Easton did not request a hearing,

consolidated or otherwise. Therefore, Mr. Easton's motion is not "inconsistent" with his petition for reconsideration as the Bureau contends. Bureau Opp. at 5. And, contrary to ClearComm's characterization, there is nothing "ironic" about Mr. Easton's suggestion that the Commission conduct an omnibus re-examination of its actions in the wake of the bidding error. ClearComm Opp. at 6.

Mr. Easton obviously does not know what actions the Commission is contemplating. All he knows is that the *Westel* hearing was stayed on the eve of its commencement in order to facilitate the Commission's consideration of his "participation in the hearing" and the "scope of the designated issues". *Westel Samoa, Inc.*, FCC 98I-02 (Feb. 3, 1998). Mr. Easton assumed that a stay would not have been ordered unless there is some likelihood that the scope of the hearing would be enlarged. Based only on that assumption, Mr. Easton invoked section 1.227 of the Rules as the authority under which the Commission may consolidate several pending matters for disposition in a possibly expanded hearing.

IV

Mr. Easton was not alone in assuming that the Commission would widen the scope of the *Westel* hearing. Only a few weeks ago, ClearComm not only saw that possibility, but it envisioned a need for a consolidated hearing. After noting the pendency of Mr. Easton's petition for reconsideration, ClearComm made the following argument in support of its request to stay the *Westel* proceeding:

It is possible that the Commission may decide that Mr. Easton should be subject to a hearing on the issue of his culpability for the underlying conduct as ClearComm's

bidding agent...yet that conduct is central to Mr. Breen's *Westel* hearing as well. Therefore judicial and Bureau economy and the public interest may support a delay in Mr. Breen's hearing until Mr. Easton's status has been resolved - in order to permit one consolidated hearing regarding this conduct.^{1/}

V

ClearComm portrays the three pending overbid-related matters as presenting "divergent" legal and factual issues. ClearComm Opp. at 8. Mr. Easton can see a scenario under which those issues easily converge. That scenario is premised on the fact that the Commission launched the *Westel* hearing specifically to determine Mr. Breen's "complicity" in the misrepresentations allegedly made by Mr. Easton. *Westel*, 12 FCC Rcd at 14060.

After reconsidering the matter, the Commission could reasonably conclude that the question of Mr. Breen's qualifications can be resolved (or reached) only after an evidentiary inquiry into whether Mr. Easton actually made "material and intentional misrepresentations" in the immediate aftermath of the overbid. *See id.* at 14059. If so, the Commission could enlarge the issues in the *Westel* hearing to add the necessary misrepresentation issue. Because Mr. Easton's alleged misrepresentations were uncovered by the Bureau's investigation, the Bureau would carry the burden of proof with respect to the misrepresentation issue it "presented". *See* 47 U.S.C. § 309(e).

In the foregoing scenario, the Commission's decision to enlarge the *Westel* issues would constitute an acknowledgement that it erred when it determined that there were "no unresolved questions of fact

^{1/} Petition for Stay at 3 n.8 (Jan. 26, 1998) (emphasis original).

with respect to the misrepresentations made by Mr. Easton". *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1689 (1977) ("*PCS 2000 MO&O*"). Whether express or implied, that acknowledgement would dictate the disposition of ClearComm's application for review and the petitions for reconsideration filed by Mr. Easton and the Trust.

VI

The enlargement of the *Westel* issues obviously would moot ClearComm's complaint that Administrative Law Judge Steinberg "has not established how the facts as determined in the *PCS 2000 NAL* and *PCS 2000 MO&O* are to be applied". ClearComm Opp. at 11 (footnote omitted). That action would also moot ClearComm's request for relief. Even if the Commission did not name it as a party to the expanded hearing, ClearComm would have the right to petition to intervene in the *Westel* case within 30 days of the Commission's order. See 47 C.F.R. § 1.223(a), (b).

VII

ClearComm now pretends to see no possible basis for consolidating its interlocutory appeal with Mr. Easton's petition for reconsideration of the *Westel* show cause order. See ClearComm Opp. at 5-10. Mr. Easton questions how ClearComm can take that position after arguing that the interests of economy may be served by "one consolidated hearing" regarding his conduct. See *supra* p. 5. In any event, there are legal and factual issues common to the matters presented by Mr. Easton and ClearComm.

Of primary concern to both Mr. Easton and ClearComm is the issue that prompted the stay of the *Westel* hearing -- the "scope of

the designated issues". Mr. Easton complained that the Commission ordered him to show cause, but did not reopen the issue of whether he misrepresented facts. See Petition for Reconsideration at 3 (Oct. 6, 1997) ("Easton Pet."). In contrast, ClearComm wants to intervene in the hearing, because it allegedly has a "vital" interest in any case in which a collateral review of the Commission's findings as to Mr. Easton "is likely to take place." ClearComm Opp. at 4-5. Consequently, the Commission's upcoming decision on the "scope" of the *Westel* issues could be dispositive with respect to Mr. Easton's due process claims and ClearComm's concerns.

Mr. Easton continues to fear that the Commission's proceedings following the bidding error were so irreparably tainted with unfairness and prejudgment as to preclude a due process remedy. However, if the Commission adds an appropriate misrepresentation issue, and considering that the new Commissioners will give the matter a fresh look, Mr. Easton's due process rights may be restored. ClearComm's interests, on the other hand, would be jeopardized. It should be given party status to protect those interests.

Conversely, if it decides not to disturb the *Westel* show cause order, the Commission necessarily will deny Mr. Easton's petition and it should uphold Judge Steinberg's decision. ClearComm has no cognizable interest in the case if Mr. Easton's conduct is not to be at issue there.

It should be noted at this point that the Commission may

question of its jurisdiction over Mr. Easton. While Mr. Easton could be made a party (or could seek to intervene), the Bureau does not need him to be a party to pursue the issue of whether he intentionally misrepresented material facts. The Bureau already intends to subpoena Mr. Easton to testify at the *Westel* hearing. He will be equally available to testify with respect to his alleged misrepresentations.

VIII

Mr. Easton assumes that the Commission will act on his petition and lift the *Westel* stay in the very near future. The Commission should act on the Trust's petition at the same time if for no other reason than it was filed "more than a year ago". Clear Comm Opp. at 7.

Contrary to ClearComm's claim, issues going to the Commission's approval of the "squeeze out" of the Trust are not "completely independent" of the two other PCS 2000 bidding error-related matters. *Id.* at 12. There is a direct link between the Commission's yet-unproven allegations of wrongdoing by Mr. Easton and the "financial harm" suffered by the Trust when the general partnership interest in PCS 2000 (ClearComm) was wrested from Unicom Corporation ("Unicom"). *PCS 2000 MO&O*, 12 FCC Rcd at 1692.

The Commission gave its express blessing to the "squeeze out", because the primary purpose of the ouster was "to remove Messrs. Easton and Breen from the ownership structure of PCS 2000." *Id.* It repeatedly lauded the "aggressive steps" that were taken, *id.* at 1689, to remove the "wrongdoers" from PCS 2000's ownership and

control, *PCS 2000 NAL*, 12 FCC Rcd at 1717. In fact, the Commission went so far as to contemptuously state that the Trust was squeezed out by the Unicom shareholders in an attempt to "cleanse" the applicant of those responsible for the wrongdoing. *Id.* at 1703.

The tenor of the Commission's findings stood to prejudice the Trust in the state court action it brought against Unicom (and others) relating to the squeeze out. See Trust Pet. at Attachment 1. Therefore, the Trust simply asked the Commission to provide declaratory relief that would basically "temper" its ruling (and its language). See *id.* at 12-13. As Mr. Easton understands it, the Trust's request for relief boiled down to the following:

By characterizing the Trust's ouster as "an attempt to cleanse the applicant of those responsible for the misrepresentations", the Commission not only portrays the Trust as a wrongdoer, but it seems to provide justification for the manner in which the Trust was ousted. **** The Trust asks the Commission to revise its ruling so that it cannot, even by a stretch of argument, be cited by PCS 2000 to justify its uncompensated taking of the Trust's property. ^{2/}

While the Trust's action has been dismissed, ClearComm expects that the law suit will be refiled in Puerto Rico. ClearComm Opp. at 4 n.6. Therefore, like ClearComm, the Trust would have a "vital" interest in any proceeding that may involve a collateral review of the Commission's *PCS 2000 NAL* findings. It follows that the Trust would have a vital interest in the Commission's decision on the scope of the *Westel* hearing.

^{2/} Trust Pet. at 14 (citation omitted).

By designating an issue going to whether Mr. Easton actually engaged in wrongdoing, the Commission effectively would provide the Trust the equitable relief it seeks. Until that issue is resolved in the *Westel* proceeding, ClearComm cannot claim in any court that there has been a final determination by a federal agency that the uncompensated taking of the Trust's property was for the "legitimate business purpose" of correcting proven misconduct. *PCS 2000 MO&O*, 12 FCC Rcd at 1699.

Regardless of the outcome of its current deliberations, the Commission's disposition of Mr. Easton's petition provides the appropriate opportunity for it to provide a "reasoned explanation" of its treatment of the Trust. See Trust Pet. at 13. The Commission owes the Trust and Mrs. Easton that much.

IX

ClearComm claims that Mr. Easton points to "absolutely nothing" in the *Westel* record that undermines the *PCS 2000 NAL*. ClearComm Opp. at 3 n.4. Perhaps not in his Motion, but Mr. Easton has done just that in previous pleadings. See, e.g., Response to Comments of ClearComm, L.P. at 12-21 (Dec. 4, 1997).

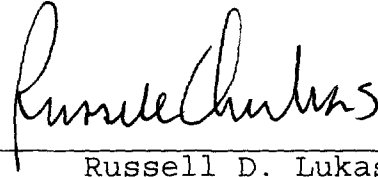
Finally, it appears that ClearComm has not reviewed all the information uncovered during discovery in the *Westel* proceeding, because it claims to be "aware of no evidence that undermines the Commission's findings with regard to Mr. Easton." ClearComm Opp. at 4. In fact, discovery has undermined most of the Commission's findings as to Mr. Easton as well as its conclusion that there was

"no material and substantial question of fact necessitating a hearing". PCS 2000 NAL, 12 FCC Rcd at 1714-15.

Respectfully submitted,

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March 5, 1998

CERTIFICATE OF SERVICE

I, Kimberly A. Verven, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 5th day of March, 1998, had a copy of the foregoing REPLY TO OPPOSITIONS TO MOTION TO CONSOLIDATE hand-delivered to the following:

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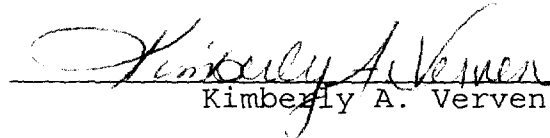
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